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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 581

MIRIAM J. WOLF,

Petitioner,

v.

CLAY BLAIR, JR., MATTHEW J. CULLIGAN, MILTON S. GOULD, MARVIN D. KANTOR and THE CURTIS PUBLISHING COMPANY,

Respondents.

BRIEF FOR RESPONDENT, THE CURTIS PUBLISHING COMPANY, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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This brief is respectfully submitted in behalf of Respondent, The Curtis Publishing Company ("Curtis"), in opposition to the petition of Miriam J. Wolf for a writ of certiorari to review a judgment of the Court of Appeals for the Second Circuit entered in the above cause.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1965. The petition attempts to invoke this Court's jurisdiction under 28 U. S. C. § 1254(1). Curtis submits,

however, that this Court is without jurisdiction to review the judgment of the court below on the ground that the issues raised by the petition are moot, as will be more fully discussed below.

QUESTIONS PRESENTED

Petitioner seeks review of the denial of her motion to enjoin Curtis from settling controversies with certain of its officers, with respect to employment contracts referred to in the Complaint, without notice to shareholders and court approval. Following the District Court's denial of the motion, Curtis negotiated settlements with respect to two of those contracts. The controversies which were settled were not the subject matter of either cause of action in Petitioner's complaint. With respect to the remaining contracts there is no showing that any controversy exists or is threatened. Thus, the questions presented are:

1. Does the absence of any showing that a controversy exists, or is threatened, with respect to any employment contracts referred to in the Complaint render moot the issues raised by Petitioner's motion and thereby deprive this Court of jurisdiction to decide those issues?

2. Does Rule 23(c) of the Federal Rules of Civil Procedure require a corporation named as a defendant in a stockholder's derivative action to submit to the District Court for its approval the settlement of individual employment contract claims which are not derivative in nature and to which neither the plaintiff in the derivative action nor any other stockholder is a party?

3. Is Petitioner entitled to injunctive relief in the absence of any showing of irreparable harm?

STATEMENT

Petitioner seeks review of the unanimous decision of the Court of Appeals for the Second Circuit affirming an order entered by the Hon. Edmund J. Palmieri, District Judge, on December 16, 1964. After oral argument and without opinion, Judge Palmieri denied from the bench Petitioner's motion to require Curtis to submit any proposed compromises or settlements of any demands made under employment contracts referred to in the Complaint to the District Court for its consideration and approval, upon notice to all stockholders.

Petitioner's motion was made in a derivative action which she brought as a stockholder of Curtis allegedly for the benefit of Curtis and on behalf of all other stockholders. The named defendants are Curtis and certain of its former and present officers and directors.

Following the decision of the Court of Appeals, and prior to filing this petition, Petitioner filed an Amended and Supplemental Complaint. The original Complaint, which is pertinent here, alleged two causes of action which can be summarized briefly as follows:

In the first cause of action, Petitioner contended that the salary provisions in the employment contracts of Respondents Matthew J. Culligan, former President and Chairman of the Board, and John M. Clifford, former Executive Vice President and now President, and certain stock options given them thereunder, resulted in excessive and unreasonable compensation to them and were a waste of corporate assets. It was also alleged that the proxy statement for the April, 1963 annual meeting of Curtis contained false and misleading statements concerning such contracts and a proposed employee stock option incentive plan and that the proxy statement represented that no stock options would be

granted to Respondent Marvin D. Kantor and that options were in fact granted to him. Finally, it was alleged that at the annual meeting in 1963, a proposal to increase the authorized shares of common stock, needed to satisfy the stock options given to Messrs. Culligan and Clifford and to be given under the stock option plan, was not properly voted on.

In the second cause of action, Petitioner alleged that the directors of Curtis had information concerning mineral discoveries on certain lands owned by a Curtis subsidiary in Canada, and that this information was omitted from the 1963 proxy statement with the result that, when the mineral discoveries were made public after the annual meeting in April, 1963, the stock options given constituted a windfall to the recipients.

Since the commencement of this action on June 1, 1964, but not as a result of any of the allegations contained in the Complaint, Curtis has made a number of changes in its management personnel. These included the resignation of Mr. Culligan, first as President, and subsequently as Chairman of the Board, the promotion of Mr. Clifford to the post of President from Executive Vice President, and the termination of the employment of Respondents Clay Blair, Jr. and Kantor as Senior Vice Presidents.

Following the termination of their employment, Messrs. Blair and Kantor commenced an action against Curtis in the Supreme Court of the State of New York, New York County, for breach of their employment contracts. That action has since been settled by an agreement between the parties thereto. See *Wolf* v. *Barkes,* 348 F. 2d 994, 998 fn. 5 (2d Cir. 1965). Curtis also gave notice to Mr. Culligan that it would terminate his employment contract on January 16, 1966, although valuable rights under his contract were to continue thereafter. *Ibid.* No controversy exists regarding Mr. Clifford's employment contract.

Clearly, the action taken with respect to the employment contracts of these three officers in no way barred or interfered with Petitioner's prosecution of this action, and she does not so contend. Indeed, the new third cause of action in her Amended and Supplemented Complaint charges general mismanagement of Curtis and, in support of that claim, cites the action taken by Curtis with respect to those contracts.

REASONS FOR DENYING THE WRIT

1. This Court Lacks Jurisdiction to Review the Judgment Below.

It is evident that no controversy exists or is threatened regarding the employment contracts with respect to which Petitioner seeks injunctive relief. Thus, this Court is not presented with a case or controversy and, for that reason, lacks jurisdiction to decide this cause. U. S. Const., Article III, Section 2; *California* v. *San Pablo & Tulare R. R.*, 149 U. S. 308; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 181-2.

2. Petitioner Has Made No Showing of Irreparable Harm.

In order to be entitled to injunctive relief, Petitioner must show a threat of irreparable harm. *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 506-7; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 561. Petitioner has not sustained this burden. The plain fact is she has not been prejudiced in any way. Her ability to prosecute this action has in no way been impaired. Moreover, she is free to attack the action which Curtis took with respect to the employment contracts, and she has, in fact, cited those actions in the Amended and Supplemental Complaint to support her claim of mismanagement.

3. The Decision is Patently Correct.

Petitioner contends that the actions taken by Curtis are subject to Rule 23(c) of the Federal Rules of Civil Procedure. The very words of the Rule clash with this contention. Unless a *"class action"* is sought to be *"dismissed or compromised"* the Rule is inapplicable. This conforms with the Rule's basic purpose of protecting the rights of the members of the class who do not appear in the proceeding but would be bound by any dismissal or settlement. See, *e.g., Webster Eisenlohr* v. *Kalodner,* 145 F. 2d 316, 320 (3d Cir. 1944); *Partridge* v. *St. Louis Joint Stock Land Bank,* 130 F. 2d 281, 286 (8th Cir. 1942); *Pelelas* v. *Caterpillar Tractor Co.,* 113 F. 2d 629, 633 (7th Cir. 1940); McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholders' Suit,* 46 Yale L. J. 421 (1937).

The actions taken by Curtis did not constitute a settlement of any of Petitioner's claims in her Complaint. Moreover, neither she nor any other stockholder was a party to the actions taken by Curtis and thus is not bound thereby. The petition suggests no valid reason why the plain meaning and basic purpose of Rule 23(c) should be ignored. Not one of the cases cited therein relates in the smallest degree to the scope or applicability of Rule 23(c); not one of the articles and speeches cited has anything to do with settling controversies which are not class actions.

While not entirely clear, Petitioner seems to suggest that Rule 23(c) has its roots in "ancient equitable principles" and that one of those principles would have required a settlement of a dispute other than a class action to be submitted for approval to a court in which a class action is pending. Even assuming Rule 23(c) has its roots in "ancient equitable principles", the Petition cites no support whatever for the novel proposition that one of those principles would have required Curtis to submit for approval

to the District Court any of the actions it took with respect to the employment contracts. The sole authority on which Petitioner relies, *Hawes v. Oakland,* 104 U. S. 450, contains merely dicta to the effect that a stockholder may sue in equity based upon a right of action existing in the corporation. Curtis does not dispute this but submits that it is entirely irrelevant.

At page 11 of the petition it is contended that the decision of the court below results in "an unwarranted dichotomy in the application of the Rule [23(c)]." It is argued that:

> "The plaintiff stockholder could not settle the corporation's claim against culpable officers and directors even with the consent of the corporation without judicial intervention and upon notice to stockholders, but the corporation itself could settle such claims out-of-court, free of such requirements."

But no such dichotomy exists. Contrary to the suggestion of Petitioner, a corporation could not settle a *class action* out-of-court, free of judicial approval. Where, however, the controversy being settled is *not* a class action, Rule 23(c) does not require either plaintiff or defendant to obtain prior court approval.

4. None of the Traditional Considerations for Granting Certiorari is Present in this Case.

The petition suggests no compelling reason for this Court to review the decision of the Court of Appeals, and no such reason exists.

1. The decision below is not in conflict with any decision of this Court.

2. The decision below is not in conflict with any other Court of Appeals decision.

3. The lack of importance of the questions raised is demonstrated by the complete lack of prejudice to Petitioner resulting from the actions taken by Curtis.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The respondent The Curtis Publishing Company has filed a brief in response to the Petition herein. None of the other parties have, so far as petitioner is informed, filed answering briefs.

This reply will, therefore, be directed to the points made in the Curtis brief.

1. This Court has jurisdiction. The issues raised below are not moot.

Although respondents Blair and Kantor were each paid substantial sums in settlement of their law suits against Curtis (commenced after this action), they are still parties to this action and subject to the jurisdiction of the Court. Respondent Culligan is still receiving and will continue to receive payments and valuable benefits under his employment contract although he is no longer in the Curtis employ. Respondent Clifford is still in the employ of Curtis and has received and will receive benefits which are challenged in this action. All of the parties are

subject to the jurisdiction of the Court since the basic issues alleged in the complaint have not yet been resolved.

The fact that a restraining order was denied by the District Court does not make the issue moot.

Mr. Justice Black wrote for this Court in *Porter* v. *Lee,* 328 U. S. 246, 251 [1946], in part, as follows:

> "It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo. Texas & New Orleans R. Co. v. Northside Belt R. Co., 276 U. S. 475, 479."

(See also *Porter* v. *Warner Holding Co.,* 327 U. S. 395, 399 [footnote 2], decided at the same Term. *Cf. Jones* v. *Securities and Exchange Commission,* 298 U. S. 1, 17-18 [1936].)

The cases cited to this point by the respondent are inapposite. *People* v. *San Pablo & T. R. Co.,* 149 U. S. 308 [1893], did not involve an appeal from the denial of an injunction. In that case, while an action brought by the State of California against a railroad company was pending in this Court on writ of error, the railroad company tendered to the state the amount of the taxes with penalties, interest and attorney's fee and costs of suit. This tender was not accepted but the railroad company deposited the money in the bank in accordance with Civil Code, Cal., § 1500, which declared that an obligation for the payment of money is extinguished by a due offer of payment if the amount is immediately deposited, in the name of the creditor, with some bank of deposit within the state, of good repute, and notice thereof is given to the creditor. This Court held that it must dismiss the writ of error when these facts appeared by admission of counsel in open court, as there was no longer any real controversy between the parties.

In *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 163, 181-182 [1931], the Government sought to enjoin violations of Section 1 and Section 2 of the Sherman Antitrust Act (July 2, 1890, Ch. 647, 26 Stat. 209, 15 U. S. C. §§ 1, 2). The violation charged was an illegal combination to create a monopoly and to restrain interstate commerce by controlling, through 79 contracts concerning patents, that part of the supply of gasoline which was produced by the process of cracking. On the trial, the Government objected to a number of early Indiana company licenses which contained certain territorial restrictions on the production of cracked gasoline, and other provisions. At the hearing before the District Court, it appeared that these provisions had never been enforced. Upon the court's request, the objectionable clauses were voluntarily cancelled before the entry of the decree. Certain other contract provisions were questioned by the lower court. At its suggestion, these provisions were formally voluntarily cancelled by the parties. This Court held that under such circumstances the alleged validity of such provisions had become moot.

None of the circumstances which formed the basis of the decisions by this Court in the cited cases are present in the instant case.

2. Petitioner was not required to make a showing of irreparable harm.

The motion to restrain and enjoin the defendants from consummating the contemplated compromises with the culpable respondents was not an application for a preliminary injunction under Federal Rules of Civil Procedure, Rule 65(b). It was an application to the court in aid of its jurisdiction, to restrain and enjoin the parties from acting in violation of the requirements imposed by FRCP, Rule 23(c). It was so considered by the courts below, as well as by the respondents, who did not raise the question

of "irreparable injury" either in the District Court or in the Court of Appeals.

The question involved here is not one of discretion but of power. The question of statutory construction raised in the petition requires an interpretation by this Court of the meaning of Rule 23(c) and its applicability to the facts in the case at bar. If Rule 23(c) is applicable, then the District Court must order compliance with its provisions. As is clearly manifest from both opinions in the Court of Appeals, petitioner did not seek the interposition of the general equity power of the court, which rests in the sound discretion of the court, but relied on the power vested in the court by Rule 23(c). It is significant that Judge Waterman, in his concurring opinion below (348 F. 2d at p. 998) expressed the belief "that it would have been better judicial administration for the learned judge below to have granted a preliminary injunction restraining the corporation from settling, compromising or issuing releases," declaring that: "[T]hereby there would have been preserved for all parties the situation plaintiff was complaining of until final resolution of plaintiff's claim on their merits." But Judge Waterman agreed with Judge Friendly that the language of Rule 23(c) "does not specifically direct that the trial judge grant the preserving injunction plaintiff requested" (id).

While in *Beacon Theatres, Inc.* v. *Westover,* 359 U. S. 500 [1959], cited by respondent, Mr. Justice Black's opinion stated the general principle that "[T]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies" (at pp. 506-7), he was not dealing with a comparable situation but with a mandamus proceeding in which petitioner sought to mandamus a District Judge to vacate certain orders alleged to deprive petitioner of a jury trial. There is no comparable situation here.

3. The respondent makes no case for the correctness of the decision below.

The position we took below and contend for here, is that Curtis may not settle any claims asserted by the individual defendants against it which affect or may affect the claims asserted on Curtis' behalf in this action without submitting such settlement for consideration and approval by the District Judge, on notice to stockholders under Rule 23(c). We submit that that is the intent of the Rule. If the Rule were limited so that the corporation could settle the defendants' cross-claims without disposing of the claims alleged in the corporation's behalf in the derivative action, then such action would frustrate the very purpose and intent of this Court in promulgating the Rule. It places a premium on out-of-court settlements between the corporation (which refused to sue its culpable officers in the first place) and the culpable defendants.

In our reply brief in the court below, we called to the attention of the court facts and circumstances of public record which indicated the significance of the timely action we took to enjoin and restrain what thereafter transpired. They are important here to demonstrate the scope of the injury to Curtis, which we sought to prevent.

On October 1, 1964, respondents Kantor and Blair, then directors, officers and employees of Curtis, at a meeting of the Board of Directors, levelled certain charges of mismanagement against appellee Culligan, then President and Chairman of the Board, in effect the chief executive officer of Curtis. Kantor and Blair were thereafter dismissed as employees. Culligan first resigned as President and later resigned as Chairman of the Board of Directors (see New York Times, January 11, 1965).

On November 23, 1964, we moved below to enjoin and restrain Curtis from settling or otherwise disposing of the Culligan, Kantor and Blair claims against Curtis without